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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JAMES M. KINDER, Plaintiff, vs. HARRAH'S ENTERTAINMENT, INC. and DOES 1 through 100, inclusive, Defendants.	CASE NO. 07 CV 2226 DMS (POR) Judge: Hon. Dana M. Sabraw Mag. Judge: Hon. Louisa S. Porter *SPECIALLY APPEARING* DEFENDANT'S OBJECTIONS AND MOTION TO STRIKE PORTIONS OF DECLARATION OF CHAD AUSTIN FILED IN SUPPORT OF PLAINTIFF JAMES M. KINDER'S MOTION TO FILE A FIRST AMENDED COMPLAINT Date: January 25, 2008 Time: 1:30 p.m. Courtroom: 10

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Specially Appearing Defendant Harrah's Entertainment, Inc. hereby objects and moves to strike the following evidence presented by Plaintiff JAMES M. KINDER in support of the motion to file first amended complaint:

OBJECTION TO THE DECLARATION OF CHAD AUSTIN

1. **Declaration of Chad Austin, Paragraph 3:** *Specially Appearing* Defendant objects to Paragraph 3 of the Declaration of Chad Austin which states:

> "I have personally listened to the tape recordings of each and every call (7 in total) made by Defendant to Plaintiff's number assigned to a paging service 619-999-9999."

Grounds for Objection: *Specially Appearing* Defendant Harrah's Entertainment, Inc. objects on the grounds that the information contained in paragraph 3 of the Declaration of Chad Austin is inadmissible hearsay and lacks proper foundation. Federal Rule of Evidence 801 provides that hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." (Fed.R.Evid. 801(c).) Federal Rule 801 further provides that a "statement" includes both "oral [and] written assertion[s]." (Fed.R.Evid. 801(a).)

Federal Rule of Evidence 802 provides that hearsay evidence is not admissible unless it falls under a statutorily enumerated exception to the hearsay exclusion. (Fed.R.Evid. 802.) The mere fact a statement was reproduced by electronic voice or video recording does not alter its status as hearsay. (*See*, *United States v. Lopez*, 584 F.2d 1175, 1179 (2d Cir. 1978) [taped telephone conversation constitutes hearsay]; *United States v. Dorrell*, 758 F.2d 427, 434 (9th Cir. 1985) [statements recorded on video tape constitute hearsay]; *see also*, *Duluth News-Tribune v. Mesabi Publ.*, 84 F.3d 1093, 1098 (8th Cir. 1996) ["the vague evidence of misdirected phone calls and mail is hearsay of a particularly unreliable nature given the lack of an opportunity for cross-examination of the caller or sender."].)

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The Federal Rules of Evidence further provide that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." (Fed.R.Evid. 602.) The personal knowledge requirement reflects the common law's judicious demand for the most reliable sources of information. (*See*, Fed.R.Evid. 602, Adv. Comm. Notes (1972); *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1028 (9th Cir. 2001) ["It is not enough for a witness to tell all [he] knows; [he] must know all [he] tells."].) The testimony of a lay witness must be based upon what he or she actually observed or perceived through his or her own senses. That is, the witness must have first-hand knowledge acquired by directly perceiving the event that is the subject of his or her testimony. (*See*, Fed.R.Evid. 602, Adv. Comm. Notes (1972) [The rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact is a most pervasive manifestation of the common law insistence on the most reliable sources of information."]; *SEC v. Singer*, 786 F.Supp. 1158, 1167 (S.D.N.Y. 1992).)

The statements made in the purported tape recordings are clearly statements made out of court. Through the declaration of Chad Austin, KINDER seeks to introduce these tape recorded telephone calls as evidence that he was called by *Specially Appearing* Defendant. This evidence is clearly inadmissible hearsay as it constitutes statements made out of court to support the truth of the propositions made in those statements—that is, that the telephone calls were made by who the recordings say they made. As such, paragraph 3 of the Declaration of Chad Austin must be stricken as inadmissible hearsay.

Not only are the statements from the tape recorded telephone calls hearsay, but Mr. Austin's recounting of the statements also constitutes inadmissible hearsay. Paragraph 3 of Mr. Austin's declaration is clearly an out of court statement, not subject to cross examination by *Specially Appearing* Defendant and contains statements offered to prove the truth of the matters asserted therein. As such, paragraph 3 of Mr. Austin's declaration constitutes inadmissible hearsay and must be stricken.

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Further, Mr. Austin lacks the requisite first-hand knowledge of the telephone calls purportedly made, as he did not directly perceive the telephone call itself which is the subject of his testimony. Mr. Austin's testimony regarding the telephone call contained in paragraph 3 of his declaration must therefore be stricken.

2. **Declaration of Chad Austin, Paragraph 4:** *Specially Appearing* Defendant objects to Paragraph 4 of the Declaration of Chad Austin which states:

> "One of the 7 calls made to Plaintiff's number assigned to a paging service, which was made on December 9, 2003 at 10:19 a.m., was what clearly appeared to be a prerecorded telemarketing call which stated that it was made on behalf of "Harrah's Rincon Casino." That casino is located in Valley Center, San Diego County, California. My investigation has revealed that Harrah's Rincon Casino is owned by the Rincon band of Mission Indians and operated by one or more of several Harrah's entities, including but not necessarily limited to defendant HARRAH'S ENTERTAINMENT, Inc. (a Delaware corporation), HARRAH'S OPERATING COMPANY, Inc. (a Delaware corporation), HARRAH'S MARKETING SERVICES CORPORATION (a Nevada corporation) and HARRAH'S LICENSE COMPANY, LLC (a Nevada limited liability company)."

Grounds for Objection: *Specially Appearing* Defendant Harrah's Entertainment, Inc. objects on the grounds that the information contained in paragraph 4 of the Declaration of Chad Austin is inadmissible hearsay and lacks proper foundation. Federal Rule of Evidence 801 provides that hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." (Fed.R.Evid. 801(c).) Federal Rule 801 further provides that a "statement" includes both "oral [and] written assertion[s]." (Fed.R.Evid. 801(a).)

Federal Rule of Evidence 802 provides that hearsay evidence is not admissible unless it falls under a statutorily enumerated exception to the hearsay exclusion. (Fed.R.Evid. 802.) The mere fact a statement was reproduced by electronic voice or video recording does not alter its status as hearsay. (*See*, *United States v. Lopez*, 584 F2d 1175, 1179 (2nd Cir. 1978) [taped telephone conversation constitutes hearsay]; *United States v. Dorrell*, 758 F2d 427, 434 (9th Cir. 1985) [statements recorded on video tape constitute hearsay]; *see also*, *Duluth News-Tribune v. Mesabi Publ.*, 84 F.3d 1093, 1098 (8th Cir. 1996) ["the vague evidence of misdirected phone calls and mail is hearsay of a particularly unreliable nature given the lack of an opportunity for cross-examination of the caller or sender."].)

The Federal Rules of Evidence further provide that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." (Fed.R.Evid. 602.) The personal knowledge requirement reflects the common law's judicious demand for the most reliable sources of information. (*See*, Fed.R.Evid. 602, Adv. Comm. Notes (1972); *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1028 (9th Cir. 2001) ["It is not enough for a witness to tell all [he] knows; [he] must know all [he] tells."].) The testimony of a lay witness must be based upon what he or she actually observed or perceived through his or her own senses. That is, the witness must have first-hand knowledge acquired by directly perceiving the event that is the subject of his or her testimony. (*See*, Fed.R.Evid. 602, Adv. Comm. Notes (1972) [The rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact is a most pervasive manifestation of the common law insistence on the most reliable sources of information."]; *SEC v. Singer*, 786 F.Supp. 1158, 1167 (S.D.N.Y. 1992).)

The statement made in the prerecorded telephone call that the call was made on behalf of "Harrah's Rincon Casino" is clearly an out of court statement offered to prove the truth of the matter asserted. The statement is offered by KINDER through the Declaration of Chad Austin, to prove that the call was in fact made by "Harrah's Rincon Casino." Therefore, paragraph 4 of the Declaration of Chad Austin constitutes inadmissible hearsay and must be stricken.

Not only are the statements from the tape recorded telephone calls hearsay, but Mr. Austin's recounting of the statements also constitutes inadmissible hearsay. Paragraph 4 of Mr. Austin's declaration is clearly an out of court statement, not subject to cross examination by *Specially Appearing* Defendant and contains statements offered to prove the truth of the matters asserted therein. As such, paragraph 4 of Mr. Austin's declaration constitutes inadmissible hearsay and must be stricken.

Further, Mr. Austin lacks the requisite first-hand knowledge of the telephone call purportedly made as he did not directly perceive the telephone call itself which is the subject of his testimony. Mr. Austin's testimony regarding the telephone call contained in paragraph 4 of his declaration therefore lacks the proper foundation of personal knowledge and must be stricken.

3. **Declaration of Chad Austin, Paragraph 5**: *Specially Appearing* Defendant objects to Paragraph 5 of the Declaration of Chad Austin which states:

> "My investigation of public title documents has revealed that HARRAH'S LAUGHLIN, Inc. (a Nevada corporation) owns "Harrah's Laughlin casino." Two (2) of the unlawful prerecorded telemarketing calls complained of in this action were calls promoting the Harrah's Laughlin Casino in Laughlin, Nevada."

Grounds for Objection: *Specially Appearing* Defendant Harrah's Entertainment, Inc. objects on the grounds that the information contained in paragraph 5 of the Declaration of Chad Austin is inadmissible hearsay and lacks proper foundation. Federal Rule of Evidence 801 provides that hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." (Fed.R.Evid. 801(c).) Federal Rule 801 further provides that a "statement" includes both "oral [and] written assertion[s]." (Fed.R.Evid. 801(a).)

Federal Rule of Evidence 802 provides that hearsay evidence is not admissible unless it falls under a statutorily enumerated exception to the hearsay exclusion. (Fed.R.Evid. 802.) The mere fact a statement was reproduced by electronic voice or video recording does not alter its status as hearsay. (*See*, *United States v. Lopez*, 584 F2d 1175, 1179 (2nd Cir. 1978) [taped telephone conversation constitutes hearsay]; *United States v. Dorrell*, 758 F2d 427, 434 (9th Cir. 1985) [statements recorded on video tape constitute hearsay]; *see also*, *Duluth News-Tribune v. Mesabi Publ.*, 84 F.3d 1093, 1098 (8th Cir. 1996) ["the vague evidence of misdirected phone calls

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and mail is hearsay of a particularly unreliable nature given the lack of an opportunity for cross-examination of the caller or sender."].)

The Federal Rules of Evidence further provide that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." (Fed.R.Evid. 602.) The personal knowledge requirement reflects the common law's judicious demand for the most reliable sources of information. (*See*, Fed.R.Evid. 602, Adv. Comm. Notes (1972); *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1028 (9th Cir. 2001) ["It is not enough for a witness to tell all [he] knows; [he] must know all [he] tells."].) The testimony of a lay witness must be based upon what he or she actually observed or perceived through his or her own senses. That is, the witness must have first-hand knowledge acquired by directly perceiving the event that is the subject of his or her testimony. (*See*, Fed.R.Evid. 602, Adv. Comm. Notes (1972) [The rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact is a most pervasive manifestation of the common law insistence on the most reliable sources of information."]; *SEC v. Singer*, 786 F.Supp. 1158, 1167 (S.D.N.Y. 1992).)

Any "investigation" that Chad Austin could have conducted was based inevitably on inadmissible hearsay. Any documents reviewed during his investigation would be out of court statements. Moreover, the statement that two of the unlawful prerecorded telemarketing calls promoted the Harrah's Laughlin Casino are also, out of court statements, made to prove that the call was in fact made by HARRAH'S LAUGHLIN, Inc. Therefore, paragraph 5 of the Declaration of Chad Austin constitutes inadmissible hearsay, and therefore, must be stricken.

Not only are the statements from the tape recorded telephone calls hearsay, but Mr. Austin's statement regarding his "investigation" lacks foundation. Mr. Austin fails to provide this Court with any information regarding what documents, information was relied on during his "investigation" supporting his statement.

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Paragraph 5 of Mr. Austin's declaration is clearly an out of court statement, not subject to cross examination by *Specially Appearing* Defendant and contains statements offered to prove the truth of the matters asserted therein. As such, paragraph 5 of Mr. Austin's declaration again lacks foundation and must be stricken.

Further, Mr. Austin lacks the requisite first-hand knowledge of the telephone calls purportedly made as he did not directly perceive the telephone call itself which is the subject of his testimony. Mr. Austin's testimony regarding the telephone call contained in paragraph 5 of his declaration must therefore be stricken.

4. **Declaration of Chad Austin, Paragraph 6**: *Specially Appearing* Defendant objects to Paragraph 6 of the Declaration of Chad Austin which states:

> "My investigation of 'public title documents' has revealed that HARRAH'S OPERATING COMPANY, Inc. owns 'Harrah's Las Vegas Casino.' Two (2) of the unlawful prerecorded telemarketing calls complained of in this action were calls promoting the Harrah's Las Vegas Casino in Las Vegas, Nevada.

Grounds for Objection: *Specially Appearing* Defendant Harrah's Entertainment, Inc. objects on the grounds that the information contained in paragraph 6 of the Declaration of Chad Austin is inadmissible hearsay and lacks proper foundation. Federal Rule of Evidence 801 provides that hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." (Fed.R.Evid. 801(c).) Federal Rule 801 further provides that a "statement" includes both "oral [and] written assertion[s]." (Fed.R.Evid. 801(a).)

Federal Rule of Evidence 802 provides that hearsay evidence is not admissible unless it falls under a statutorily enumerated exception to the hearsay exclusion. (Fed.R.Evid. 802.) The mere fact a statement was reproduced by electronic voice or video recording does not alter its status as hearsay. (*See*, *United States v. Lopez*, 584 F2d 1175, 1179 (2nd Cir. 1978) [taped telephone conversation constitutes hearsay]; *United States v. Dorrell*, 758 F2d 427, 434 (9th Cir. 1985) [statements recorded on video tape constitute hearsay]; *see also*, *Duluth News-Tribune v.*

Mesabi Publ., 84 F.3d 1093, 1098 (8th Cir. 1996) ["the vague evidence of misdirected phone calls and mail is hearsay of a particularly unreliable nature given the lack of an opportunity for cross-examination of the caller or sender."].)

The Federal Rules of Evidence further provide that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." (Fed.R.Evid. 602.) The personal knowledge requirement reflects the common law's judicious demand for the most reliable sources of information. (*See*, Fed.R.Evid. 602, Adv. Comm. Notes (1972); *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1028 (9th Cir. 2001) ["It is not enough for a witness to tell all [he] knows; [he] must know all [he] tells."].) The testimony of a lay witness must be based upon what he or she actually observed or perceived through his or her own senses. That is, the witness must have first-hand knowledge acquired by directly perceiving the event that is the subject of his or her testimony. (*See*, Fed.R.Evid. 602, Adv. Comm. Notes (1972) [The rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact is a most pervasive manifestation of the common law insistence on the most reliable sources of information."]; *SEC v. Singer*, 786 F.Supp. 1158, 1167 (S.D.N.Y. 1992).)

Any "investigation" that Chad Austin could have conducted was based inevitably on inadmissible hearsay. Any documents reviewed during his investigation would be out of court statements. Moreover, the statement that two of the unlawful prerecorded telemarketing calls promoted the Harrah's Las Vegas Casino are also, out of court statements, made to prove that the call was in fact made by HARRAH'S OPERATING COMPANY, Inc. Therefore, paragraph 6 of the Declaration of Chad Austin constitutes inadmissible hearsay, and therefore, must be stricken.

Not only are the statements from the tape recorded telephone calls hearsay, but Mr. Austin's statement regarding his "investigation" lacks foundation. Mr. Austin fails to provide this Court with any information regarding what documents and/or information was relied upon during his "investigation" supporting his statement.

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Paragraph 6 of Mr. Austin's declaration is clearly an out of court statement, not subject to cross examination by *Specially Appearing* Defendant and contains statements offered to prove the truth of the matters asserted therein. As such, paragraph 6 of Mr. Austin's declaration again lacks foundation and must be stricken.

Further, Mr. Austin lacks the requisite first-hand knowledge of the telephone calls purportedly made as he did not directly perceive the telephone call itself which is the subject of his testimony. Mr. Austin's testimony regarding the telephone call contained in paragraph 6 of his declaration must therefore be stricken.

5. **Declaration of Chad Austin, Paragraph 7:** *Specially Appearing* Defendant objects to Paragraph 7 of the Declaration of Chad Austin which states:

> "My investigation of public title documents has revealed that HBR REALTY COMPANY, Inc. (a Nevada corporation) owns 'Harrah's Council Bluffs Casino.' One (1) of the unlawful prerecorded telemarketing calls complained of in this action was a call promoting the Harrah's Council Bluffs Casino in Council Bluffs, Iowa.

Grounds for Objection: *Specially Appearing* Defendant Harrah's Entertainment, Inc. objects on the grounds that the information contained in paragraph 7 of the Declaration of Chad Austin is inadmissible hearsay and lacks proper foundation. Federal Rule of Evidence 801 provides that hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." (Fed.R.Evid. 801(c).) Federal Rule 801 further provides that a "statement" includes both "oral [and] written assertion[s]." (Fed.R.Evid. 801(a).)

Federal Rule of Evidence 802 provides that hearsay evidence is not admissible unless it falls under a statutorily enumerated exception to the hearsay exclusion. (Fed.R.Evid. 802.) The mere fact a statement was reproduced by electronic voice or video recording does not alter its status as hearsay. (*See, United States v. Lopez*, 584 F2d 1175, 1179 (2nd Cir. 1978) [taped telephone conversation constitutes hearsay]; *United States v. Dorrell*, 758 F2d 427, 434 (9th Cir. 1985) [statements recorded on video tape constitute hearsay]; *see also, Duluth News-Tribune v.*

Mesabi Publ., 84 F.3d 1093, 1098 (8th Cir. 1996) ["the vague evidence of misdirected phone calls and mail is hearsay of a particularly unreliable nature given the lack of an opportunity for cross-examination of the caller or sender."].)

The Federal Rules of Evidence further provide that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." (Fed.R.Evid. 602.) The personal knowledge requirement reflects the common law's judicious demand for the most reliable sources of information. (*See*, Fed.R.Evid. 602, Adv. Comm. Notes (1972); *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1028 (9th Cir. 2001) ["It is not enough for a witness to tell all [he] knows; [he] must know all [he] tells."].) The testimony of a lay witness must be based upon what he or she actually observed or perceived through his or her own senses. That is, the witness must have first-hand knowledge acquired by directly perceiving the event that is the subject of his or her testimony. (*See*, Fed.R.Evid. 602, Adv. Comm. Notes (1972) [The rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact is a most pervasive manifestation of the common law insistence on the most reliable sources of information."]; *SEC v. Singer*, 786 F.Supp. 1158, 1167 (S.D.N.Y. 1992).)

Any "investigation" that Chad Austin could have conducted was based inevitably on inadmissible hearsay. Any documents reviewed during his investigation would be out of court statements. Moreover, the statement that one of the unlawful prerecorded telemarketing calls promoted the Harrah's Council Bluffs Casino is also an out of court statement, made to prove that the call was in fact made by HBR REALTY COMPANY, Inc. Therefore, paragraph 7 of the Declaration of Chad Austin constitutes inadmissible hearsay, and therefore, must be stricken.

Not only are the statements from the tape recorded telephone calls hearsay, but Mr. Austin's statement regarding his "investigation" lacks foundation. Mr. Austin fails to provide this Court with any information regarding what documents and/or information was relied upon during his "investigation" supporting his statement.

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Paragraph 7 of Mr. Austin's declaration is clearly an out of court statement, not subject to cross examination by *Specially Appearing* Defendant and contains statements offered to prove the truth of the matters asserted therein. As such, paragraph 7 of Mr. Austin's declaration again lacks foundation and must be stricken.

Further, Mr. Austin lacks the requisite first-hand knowledge of the telephone call purportedly made as he did not directly perceive the telephone call itself which is the subject of his testimony. Mr. Austin's testimony regarding the telephone call contained in paragraph 7 of his declaration must therefore be stricken.

6. **Declaration of Chad Austin, Paragraph 8**: *Specially Appearing* Defendant objects to Paragraph 8 of the Declaration of Chad Austin which states:

> "One (1) of the unlawful prerecorded telemarketing calls complained of in this action was a call promoting the Harrah's Metropolis Casino in Metropolis, Illinois. I do not yet know which Harrah's entity or entities own Harrah's Metropolis Casino, but I believe that Owner to be HBR REALTY COMPANY, Inc., the same entity who owns Harrah's Council Bluffs Casino.

Grounds for Objection: *Specially Appearing* Defendant Harrah's Entertainment, Inc. objects on the grounds that the information contained in paragraph 8 of the Declaration of Chad Austin is inadmissible hearsay and lacks proper foundation. Federal Rule of Evidence 801 provides that hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." (Fed.R.Evid. 801(c).) Federal Rule 801 further provides that a "statement" includes both "oral [and] written assertion[s]." (Fed.R.Evid. 801(a).)

Federal Rule of Evidence 802 provides that hearsay evidence is not admissible unless it falls under a statutorily enumerated exception to the hearsay exclusion. (Fed.R.Evid. 802.) The mere fact a statement was reproduced by electronic voice or video recording does not alter its status as hearsay. (*See*, *United States v. Lopez*, 584 F2d 1175, 1179 (2nd Cir. 1978) [taped telephone conversation constitutes hearsay]; *United States v. Dorrell*, 758 F2d 427, 434 (9th Cir. 1985) [statements recorded on video tape constitute hearsay]; *see also*, *Duluth News-Tribune v.*

Mesabi Publ., 84 F.3d 1093, 1098 (8th Cir. 1996) ["the vague evidence of misdirected phone calls and mail is hearsay of a particularly unreliable nature given the lack of an opportunity for cross-examination of the caller or sender."].)

The Federal Rules of Evidence further provide that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." (Fed.R.Evid. 602.) The personal knowledge requirement reflects the common law's judicious demand for the most reliable sources of information. (*See*, Fed.R.Evid. 602, Adv. Comm. Notes (1972); *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1028 (9th Cir. 2001) ["It is not enough for a witness to tell all [he] knows; [he] must know all [he] tells."].) The testimony of a lay witness must be based upon what he or she actually observed or perceived through his or her own senses. That is, the witness must have first-hand knowledge acquired by directly perceiving the event that is the subject of his or her testimony. (*See*, Fed.R.Evid. 602, Adv. Comm. Notes (1972) [The rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact is a most pervasive manifestation of the common law insistence on the most reliable sources of information."]; *SEC v. Singer*, 786 F.Supp. 1158, 1167 (S.D.N.Y. 1992).)

Any "investigation" that Chad Austin could have conducted was based inevitably on inadmissible hearsay. Any documents reviewed during his investigation would be out of court statements. Moreover, the statement that one of the unlawful prerecorded telemarketing calls promoted the Harrah's Metropolis Casino is also an out of court statement, made to prove that the call was in fact made by HBR Realty Company or another "Harrah's" entity. Therefore, paragraph 8 of the Declaration of Chad Austin constitutes inadmissible hearsay, and therefore, must be stricken.

Not only are the statements from the tape recorded telephone calls hearsay, but Mr. Austin's statement regarding his "investigation" lacks foundation. Mr. Austin fails to provide this Court with any information regarding what documents and/or information was relied upon during his "investigation" supporting his statement.

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Paragraph 8 of Mr. Austin's declaration is clearly an out of court statement, not subject to cross examination by *Specially Appearing* Defendant and contains statements offered to prove the truth of the matters asserted therein. As such, paragraph 8 of Mr. Austin's declaration again lacks foundation and must be stricken.

Further, Mr. Austin lacks the requisite first-hand knowledge of the telephone calls purportedly made as he did not directly perceive the telephone call itself which is the subject of his testimony. Mr. Austin's testimony regarding the telephone call contained in paragraph 8 of his declaration must therefore be stricken.

SHEA STOKES ROBERTS & WAGNER, ALC

Dated: January 11, 2008

By: /s/Ronald R. Giusso
Maria C. Roberts
Ronald R. Giusso
Attorneys for *Specially Appearing* Defendant
HARRAH'S ENTERTAINMENT, INC.